No. 89-701

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

TUOLUMNE PARK and RECREATION DISTRICT, and FRIENDS OF SIERRA RAILROAD, INC.,
Petitioners,

v.

INTERSTATE COMMERCE COMMISSION, UNITED STATES OF AMERICA, and FIBREBOARD CORPORATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF OF PETITIONERS

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The Interstate Commerce Commission (ICC) unquestionably violated section 106 of the National Historic Preservation Act (NHPA), 16 U.S.C. § 470f, and section 102 of the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332, in the proceeding below. The *Federal Register* notice on which ICC relies to cut off judicial review for enforcement of NEPA and NHPA itself violates binding regulations issued under NEPA and NHPA requiring effective notice. ICC has conceded that the kind of "notice" afforded here was ineffective, and pervasively so. Pet. App. 59a-60a. Such a notice is contrary to 40 C.F.R. § 1506.6(b)(1), as expressly declared by the Coun-

cil on Environmental Quality (CEQ) at 46 Fed. Reg. 18037 (1981).[1] ICC's reliance on *Federal Register* notice also violated 36 C.F.R. § 800.5(b) as issued by the Advisory Council on Historic Preservation (ACHP).[2] It is perverse to claim that violations of NEPA and NHPA are shielded by a notice which itself violates NEPA and NHPA.[3] If this were the case, no one could ever obtain judicial review of notices violating NEPA and NHPA (or of other violations of NEPA and NHPA associated with illegal notices), because by definition no one would find out in time.[4]

ICC cites no case holding that a notice which violates NEPA and NHPA is insulated from judicial review, or

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[1] ICC cites no case holding that *Federal Register* notice is always adequate for purposes of compliance with (or putting "intervenors" on notice for purposes of) NEPA and NHPA.

[2] 36 C.F.R. § 800.5 requires ICC to provide the State Historic Preservation Officer or the Advisory Council on Historic Preservation with a determination of the effect that the abandonment will have on historic properties. These findings must be accompanied by documentation and must be made available to the public. The *Federal Register* notice contained nothing addressing these matters. Further, the notice which ICC claims it provided the State Historic Preservation Officer was similarly unlawfully lacking in any content.

[3] It is especially perverse for ICC to make this claim when it contends that ICC itself is not chargeable with knowledge of its own *Federal Register* notices about the rail line in question. Federal Resp. Opp. at 9 n.14 (to impute to ICC knowledge of what it puts in *Register* "would be an unrealistic and impossible burden").

[4] ICC claims that it served a notice on the California State Historic Preservation Officer (Fed. Resp. Opp. at 4), but ICC staff have indicated that the kind of notice involved (a general notice which did not indicate historic or environmental impacts) was inadequate to apprise relevant state officials. Pet. App. at p. 59a-60a (ICC memo conceding inadequacy of notice generally and in this particular case). The Court of Appeals for the District of Columbia Circuit specifically found that no reliance could be placed on the kind of "notice" ICC employed here. *Illinois Commerce Commission v. ICC*, 848 F.2d 1248, 1260 (D.C. Cir. 1988), *cert. denied*, 109 S.Ct. 783 (1989).

insulates the underlying proceeding from judicial review. *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380, 384-85 (1947), cited by ICC, predates both NEPA and NHPA and certainly did not involve this question. ICC evidently admits that statutes can require more than *Federal Register* notice (*see* Fed. Resp. Opp. at 10, citing *Matzke v. Block*, 732 F.2d 799 (10th Cir. 1984) and *Allison v. Block*, 723 F.2d 631 (8th Cir. 1983)), but then totally ignores our point that this is exactly what NEPA and NHPA require.[5]

ICC v. Brotherhood of Locomotive Engineers, 482 U.S. 270 (1987), is inapplicable. It did not involve an *ex parte* proceeding with illegal notice. Nothing in it suggests that the agency through unlawful notice can shield unlawful results reached in an *ex parte* proceeding.[6]

The Ninth Circuit erred when it held that unlawful notice was sufficient to shield an unlawful action from any judicial review. The Ninth Circuit's reliance on the unlawful notice is in direct conflict with the D.C. Cir-

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[5] Indeed, this Court has repeatedly emphasized the public notice and information dissemination purpose of NEPA. *E.g., Robertson v. Methow Valley Citizens Council*, 109 S.Ct. 1835, 1845 (1989); *Baltimore Gas and Electric Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 97 (1983).

[6] Although petitioners view *Brotherhood of Steam Locomotive Engineers* as totally inapposite simply on the notice issue, there is another grounds on which it is readily distinguishable. ICC contends that, under *Brotherhood of Locomotive Engineers*, a decision not to reopen is subject to judicial review only if based on new evidence and not on "material error." ICC suggests that it has only committed "material error" below. But the specific ICC regulation involved in this proceeding—49 C.F.R. § 1152.50 (1985)—states that the agency "shall reject" the exemption notice if it contains "false or misleading" information and its use "is void *ab initio*." The words "shall reject" and the expression "is void *ab initio*" are mandatory, not discretionary. The railroad's filing falsely and at least misleadingly asserted the property was "not suitable" for any public purpose. Under ICC's own regulation, the agency *must* reject the notice and reopen to the extent necessary to do so.

cuit's determination that the notice was legally deficient in *Illinois Commerce Commission v. ICC*, *supra*, 848 F.2d at 1260. The Ninth Circuit's ruling ignores binding regulations issued by CEQ and ACHP, as well as the principles of NEPA as declared by this Court. An agency, like a private citizen, should not be permitted to hide violations of law through procedures which violate the law. The petition for certiorari should be granted.

Respectfully submitted,

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